Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

BETTY TRAVIS,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM; UNIVERSITY OF TEXAS AT SAN ANTONIO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After a week-long trial, a jury found that the Defendants, the University of Texas Board of Regents and the University of Texas at San Antonio, discriminated and retaliated against Plaintiff Betty Travis by denying her application for promotion to Full Professor for 1993-94 and 1994-95. They also ruled that the University retaliated against Travis for the filing of charges with the EEOC and the federal lawsuit when they summarily terminated a salary supplement she was receiving from the Office of Naval Research and by firing her as an Assistant Division Director, a position she had held for six years.

The Fifth Circuit Court of Appeals overturned the jury verdict, concluding that "as a matter of law Travis did not prove a violation of Title VII by a preponderance of the evidence." The questions presented here are:

1. Does the decision of the Fifth Circuit violate the 1991 amendment to the Civil Rights Act and the interpretation of *Hicks* by most of the other circuit courts by requiring plaintiff to prove, not only a strong prima facie case and demonstration of pretext, but also that sex was "*the* reason" for her promotion denial?

2. Does the decision of the Fifth Circuit violate the Seventh Amendment to the Constitution and Rule 50(a) of the Federal Rules of Civil Procedure by overturning the jury verdict and reweighing the evidence presented at trial against the nonmoving party, including crucial evidence favorable to plaintiff?

QUESTIONS PRESENTED – Continued

3. Does the decision of the Fifth Circuit create a conflict among the circuits by disallowing plaintiff to demonstrate that the subjective criteria used by defendants for her promotion denial were pretextual, thus providing immunity to universities from Title VII?

4. Does the decision of the Fifth Circuit violate the Supreme Court's ruling in *Price Waterhouse* since it based its decision on a proffered reason that was not known at the time of the decision and which contained substantial and numerous errors?

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PETITION FOR WRIT OF CERTIORARI

Plaintiff Betty Travis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 8, 1997, in order to resolve conflicts between the Fifth Circuit and most other circuits on the important issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is published. It is reprinted in Appendix A hereto ("App. A") at page A-1. By order filed, October 7, 1997, the Fifth Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. B, A-17.

JURISDICTION

The Court of Appeals for the Fifth Circuit issued an opinion September 8, 1997 reversing the judgment in Travis' favor based upon the jury verdict and rendering a take-nothing judgment in favor of the University and the Board of Regents. The Petitioner herein filed a timely petition for rehearing which was denied October 7, 1997. Pursuant to Supreme Court Rule 13.1, this petition has been filed within ninety (90) days of the denial of rehearing.

The jurisdiction of this Court is involved pursuant to 28 U.S.C. § 1254(1). The decision below conflicts with the

decision of this Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1991) and with the language and intent of Congress in enacting the Civil Rights Act of 1991.

Moreover, the decision creates a conflict in the Circuits concerning the application of *Hicks* to the 1991 Amendments by requiring a plaintiff in order to prevail on a Title VII gender discrimination complaint to prove not only that the employer's stated reasons for taking an adverse employment action, but also that the employer engaged in illegal discrimination. The Fifth Circuit in the decision required Travis to present sufficient evidence that her sex was *the* reason for the failure to promote thereby requiring the plaintiff to prove that her gender was the sole determinative factor or motivating factor in the failure to promote her.

Other circuits recognize that requiring an employee to establish both that the employer's explanation for the adverse action is untrue and that the real reason is unlawful discrimination implicitly requires the employee to prove that the unlawful motive is the sole cause of the adverse decision. See *Fields v. New York State Office of Mental Retardation and Dev. Disabilities*, 115 F.3d 116, 119 (2nd Cir. 1997).

Therefore, Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The District Court had jurisdiction over the controversy pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED IN THE CASE

42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer –
>
> > (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(m) provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-3, in pertinent part, provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, arrested, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the

right to a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

FED. R. CIV. P 50(a) provides:

(a) Judgment as a Matter of Law

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such motion shall specify the judgment sought and the law and those facts on which the moving party is entitled to the judgment.

STATEMENT OF THE CASE

Plaintiff Betty Travis, a tenured Associate Professor, was denied promotion to Full Professor by the University of Texas at San Antonio for 1993-94 and 1994-95. During the 94-95 promotion cycle, Travis was ranked #1 for promotion by her Division, her Division Director, and the College Promotion committee, ahead of 5 males. The Dean of the College ranked her #2 for promotion, ahead

of 3 males. (One male withdrew his application for promotion after he was ranked last by the college committee.) The President and Provost promoted three of the males ranked below Travis. The defendants' reason for Travis' denial, "lack of scholarship," was refuted by faculty and expert witnesses who testified for Travis. Every year Travis had received "Very Good" and "Outstanding" performance evaluations, mostly "Outstanding." These evaluations were higher than the males who were promoted. Travis also was the only candidate for promotion who had won the Best Teaching Award, the President's Outstanding Service Award, and had brought in over $3 million in grants to the University, more than 10 times the total of the males combined. Members of the division and college committees testified that they used the same promotion criteria for Travis as for the males and then ranked her #1 for promotion. Faculty and expert witnesses testified to the international reputation of her journals and her good, strong research. Including the written evaluations of the faculty committees, the jury had the opinions of over 30 academic scholars in her area or in closely related areas who testified to her credentials. The University brought in only one expert, who was contacted after the promotion denials and who was not given all her publications to evaluate. Even then, he commented that Travis could have been promoted at his institution, the University of Wisconsin at Madison, on the basis of her teaching and service. The jury also rejected the University's "lack of scholarship" claim: a chart prepared by the Provost showing an "analysis" of Travis' scholarly works compared with the males. The analysis was done over a year AFTER the decisions were made and through

direct and rebuttal testimony was shown to contain numerous, substantial errors. Travis objected to the introduction of the chart, indicating that she had not been given the exhibit until the start of the trial. The district court ruled that the chart could only be used as a demonstrative aid to list the categories that might be used in classifying journals. The jury was told that the chart was developed after the promotion decisions and that the data were not authenticated.

The claims of retaliation were based on three activities that occurred within a few months after Travis filed her lawsuit: 1) a previously approved salary supplement was summarily terminated; 2) she was fired as Assistant Division Director, a position she had held for 6 years; and 3) she was denied promotion a second year. Travis presented direct evidence of retaliation, including an unrefuted statement from the Dean that she would have been promoted in '95 but then "hit us with a lawsuit"; a handwritten response by the President to a faculty member's letter, with the notation that Travis should be promoted the next year but she needed to "stay calm" and indicating there were "some" privileged reasons for the denial; and a confidential memo to the auditor by the President, naming Travis' lawsuit and instructing the auditor to make his inquiry into Travis' salary supplement a priority. Indirect evidence of retaliatory motive behind the termination of the salary supplement included testimony by two vice presidents at the University. One testified that the only other terminated faculty supplement was reinstated as a consulting fee. Testimony from the Vice President of Business also stated that faculty could receive supplements from grants as long as paperwork

was done to include the supplements in the budget. The University's auditor furthermore admitted that his own interpretation of the guidelines regarding supplement payments was just an opinion.

REASONS FOR GRANTING THE WRIT

I. The decision of the Fifth Circuit violates the 1991 amendment to the Civil Rights Act and the interpretation of *Hicks* by most of the other circuit courts by requiring plaintiff to prove, not only a strong prima facie case and demonstration of pretext, but also that sex was "*the* reason" for her promotion denial.

Plaintiff requests the Supreme Court to clarify the quantum and nature of evidence that will permit a jury to find that an employer engaged in impermissible gender discrimination. In their opinion, the Fifth Circuit states "The dispositive question, however, is not whether the University made a mistake or whether it gave forthright explanations for its failure to promote. Instead, we must determine whether Travis has presented sufficient evidence that her sex was *the* reason for the failure to promote." (emphasis added).

The decision of the Fifth Circuit conflicts with the interpretation of most other circuits in the effect of the Supreme Court's opinion in *Hicks* on the inferences that the finder of fact may draw from its disbelief of the employer's proffered justification for the employment action and the amount and type of evidence needed to sustain a jury verdict.

Although the Supreme Court held that a judgment for the plaintiff is not compelled by the disbelief of the employer's reasons, the Court explicitly stated that a finding that the defendants' proffered reasons are pretextual permits the fact finder to draw the inference that the defendant intentionally discriminated against the plaintiff. *Id.* at 511. "[T]he fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.* The Court explained that "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination," and continued "[n]o additional proof of discrimination is required." *Id. quoting Hicks*, 970 F.2d at 493.

The Third Circuit, in *Fuentes v. Perskie*, 32 F.3d 759 (1994) stated that a plaintiff can survive summary judgment (or judgment as a matter of law) if he/she can produce sufficient evidence that the employer's proffered non-discriminatory reason for its action was not the true reason.

The majority of other federal courts of appeals appear to have interpreted *Hicks* in a similar manner to the Third Circuit. *Aka v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) ("As *Hicks* explained, a fact finder's rejection of the employer's nondiscriminatory reasons, while not sufficient to compel a finding of discrimination, nonetheless suffices to permit such a finding."), *cert. dismissed*, 116 S.Ct. 1037 (1996); *E.E.O.C. v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831 (6th Cir. 1997); *Perdomo v.*

Browner, 67 F.3d 140 (7th Cir. 1995); *Moschetti v. Chicago Central & Pacific R.R. Co.*, 119 F.3d 707 (8th Cir. 1997); *Cordova v. State Farm Ins. Companies*, 124 F.3d 1145 (9th Cir. 1997); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 993) ("[A]s St. Mary's recognizes, the fact finder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more . . . "); *Sheridan v. Dupont*, 100 F.3d 1061 (3rd Cir. 1997) (en banc).

In *Fields v. New York State Office of Mental Retardation & Dev. Disabilities*, 115 F.3d 116, 119 (2nd Cir. 1997), the court states that "Fields is therefore entirely correct in his implicit assumption that he need not prove that discrimination was the sole motivating factor."

In an amicus curiae brief to the Third Circuit, the Equal Employment Opportunity Commission writes "that a prima facie case, coupled with a non-credible justification from the employer, is sufficient to support a finding of discrimination." EEOC Enforcement Guidance on *St. Mary's Honor Center v. Hicks*, EEOC Comp. Man. (BNA), N:3361, 3363 n.3 (Apr. 12, 1994), quoted in *Sheridan v. Dupont* at 1068.

Appellate courts in the First and Fifth Circuits disagree and imply that "pretext-plus" must be shown. *Walton v. Bisco Industries, Inc.*, 119 F.3d 368, 372 (5th Cir. 1997) ("Separate from her pretext evidence, Walton has nothing to suggest that impermissible discrimination underlies her termination."); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 842-43 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 1398 (1994).

The Fifth Circuit in requiring that "pretext-plus" be proven to establish a Title VII violation contravenes the language and intent of Congress in amending Title VII in 1991. Congress amended the Act to allow an employee to establish an unlawful employment practice "when the complaining party demonstrates that race, color, religion, sex or national origin was *a motivating factor* for any employment practice" (emphasis added). 42 U.S.C. § 2000e-2(m). Thus, an aggrieved individual in order to establish a violation of Title VII need not prove that the unlawful motive was *the* reason for the adverse employment action.

II. The decision of the Fifth Circuit violates the Seventh Amendment to the Constitution and Rule 50(a) of the Federal Rules of Civil Procedure by overturning the jury verdict and reweighing the evidence presented at trial against the nonmoving party, including crucial evidence in Plaintiff's favor.

Plaintiff requests that the Court clarify the standards for review when a plaintiff has prevailed in a jury trial on a Title VII sex discrimination claim. The Fifth Circuit not only reweighed the evidence in the movant's favor, but subjectively redefined and/or omitted crucial elements of the plaintiff's evidence.

In *Anderson v. Bessemer City*, 470 U.S. 564 (1984), the Court repeated that a finding of intentional discrimination is a finding of fact:

> "If the district court's account of the evidence is plausible . . . , the court of appeals may not reverse it even though convinced that had it

> been sitting as the trier of fact, it would have weighed the evidence differently. . . . This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* at 573-74. The court concluded by commenting that under the standards of review, deference to the trier of fact "is the rule, not the exception." *Id.* at 575.

Other courts agree with this statement. "It is not the function of this court to reweigh the evidence anew, particularly when findings . . . are based on in-court credibility determinations." *Ottaviani v. State University of New York at New Paltz*, 875 F.2d 365, 375 (2nd Cir. 1989). The "standard of review is crucial to the appellate task in this fact-intensive environment" and a court of appeals cannot decide factual issues anew. "Put bluntly, appellate review of complex fact-dominated issues cannot be allowed to descend to the level of Monday morning quarterbacking." *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 392-93 (1st Cir. 1990). "While a different set of inferences could supportably have been drawn, it is not our province to second-guess the trial court." *Jackson v. Harvard University*, 900 F.2d 464, 467 (1st Cir. 1990), *cert. denied*, 498 U.S. 848 (1990).

If a case is tried to a jury, the standard of judicial review is even more deferential to the jury as trier of fact than the "clearly erroneous" standard of FED. R. CIV. P. 52(a). In a jury trial, the trial judge (and presumably the circuit court) may enter judgment for a party as a matter of law only if there is "no legally sufficient evidentiary basis for a reasonable jury to have found for that party." FED. R. CIV. P. 50(a).

Judgment as a matter of law may only be granted if there exists "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture," or the evidence in favor of the movant is so overwhelming "that reasonable and fair minded [persons] could not arrive at a verdict against [it]." *Cruz v. Local Union No. 3*, 34 F.3d 1148, 1154 (2nd Cir. 1994) (internal quotations omitted).

The jury was entitled to assess the credibility of witnesses. See *Ray v. Iuka Special Mun. Separate Sch. Dist.*, 51 F.3d 1246, 1251 (5th Cir. 1995) (noting that assessment of the credibility of witnesses is a jury function); *Boeing v. Shipman*, 411 F.3d 365, 375 (5th Cir. 1969) ("[I]t is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of the witnesses.").

The decision of the Fifth Circuit re-weighed the evidence making findings by resolving conflicts favor of the minority. The Court stated: " . . . the males had stronger records [than Travis]" (Decision, p. 11). Yet, three males who were promoted had lower ratings by the College Promotion Committee. In addition, the circuit court expressed a subjective conclusion by stating that the change in Travis' credentials from 93-94 to 94-95 was "marginal" (Decision, p. 14). Yet, several witnesses, including the Dean, testified that the change was substantial. These issues give rise to differences in testimony, which are jury questions and not subject to review.

The panel also determined which statistics were relevant to the case. "This extremely small sample hardly establishes discrimination. . . . The more relevant statistic is University-wide, . . . " (Decision, p. 12). Yet, "the weight to be accorded admissible statistical evidence is for the jury to decide." *Walther v. Lone Star Gas*, 952 F.2d 119 (5th Cir. 1992).

The Fifth Circuit decision noted that: "Although the dean of the college praised Travis for her teaching skills and her success in landing grants for the University, his report indicated that Travis' research was only 'marginally adequate.' " (Decision, p. 3). However, the Dean never said Travis' research was "only 'marginally adequate' " in either his testimony or his report. The jury heard the testimony of the Dean and had his report as evidence in which he rated her overall research record in 93-94 "good to very good." He further testified that her research program for 1994-95 was more focused and impressive and he rated her overall research "very good." R.O.A. Vol. 7, pp. 401-03.

The Fifth Circuit accepted the Provost's statement that the division and college committees had not scrutinized Travis' file carefully. Yet, college and division committee chairpersons testified that they evaluated Travis' file using the same criteria and standards of promotion that were used for the male candidates. They also testified that Travis' promotion file was superior to the males. The decision of the Fifth Circuit resolved this conflict of testimony in the University's favor.

Defendants maintain that Travis was not promoted because of her "lack of scholarship" and they cite several

considerations that they argue factored into the determination. That argument overlooks the important consideration that the jury has spoken. Although the appellate court found the University's explanations credible, the district court and the jury did not. Since evaluation of witness credibility is the exclusive function of the jury, they are allowed to discredit any testimony. The jury either heard or read testimony from over 30 professional scholars in Plaintiff's field or closely related fields who testified to her scholarly accomplishments. This was so compelling as to cast sufficient doubt on the reasons proffered by the University so that the jury could reasonably conclude that each reason was a fabrication or was manufactured post-hoc. Since Plaintiff produced evidence that lesser qualified men were promoted and that she was held to a higher standard than the males, the jury could infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. Numerous inconsistencies in the testimony of the Provost could also lead the jury to a suspicion of mendacity.

III. The decision of the Fifth Circuit creates a conflict among the circuits by disallowing Plaintiff to demonstrate that the subjective criteria used by Defendants for her promotion denial were pretextual, thereby granting immunity to universities from Title VII.

A consequence of the decision by the Fifth Circuit is that universities will be granted immunity from Title VII. Their decision states: "We cannot turn an attack on [the University's] standards, however outmoded they might

be, into a Title VII case." (Decision, p. 11). However, rulings from the Third and Tenth Circuits state that this is the only way to proceed when subjective evaluations are involved.

"[A] plaintiff has the burden of casting doubt on an employer's articulated reasons . . . ". See *Ezold v. Wolf, Block, Schorr, and Solis-Cohen*, 983 F.2d 509, 531 (3rd Cir. 1992) *citing Lucas v. Dover*, 857 F.2d 1397, 1403-04 (10th Cir. 1988). "When an employer relies on its subjective evaluation of the plaintiff's qualifications as the reason for denying promotion, the plaintiff can prove the articulated reason is unworthy of credence by presenting persuasive comparative evidence that non-members of the protected class were evaluated more favorably, i.e., their deficiencies in the same qualification category as the plaintiff's were overlooked for no apparent reason when they were promoted . . . **Evidence establishing such incredibility must show that the standard or criterion the employer relied on was 'obviously weak or implausible.'** " *Ezold*, at 531. (emphasis added).

The decision of the Fifth Circuit rejects the established standards for judging University tenure/promotion cases. There is established precedent that courts should review in cases where the University's proffered reasons are unworthy of credence or are manifestly unequally applied (*Brown v. Boston Univ.*, 891 F.2d 337, (1st Cir. 1989), or there is evidence of discrimination. (*Kumar v. Board of Trustees, Univ. of Mass*, 774 F.2d 1, (1st Cir. 1985)). Also, the circuit court cited no previous academic cases to support their position. With their decision, the Fifth Circuit has set a dangerous new precedent by allowing universities to discriminate freely. Using the

model adopted by the University and approved by the Fifth Circuit, universities can create artificial "standards" after decisions have been made to hide their discriminatory motives.

Although the courts have recognized how difficult it is to prove a violation of Title VII in a professional setting where decisions are made by collegial groups using subjective criteria (*Fields v. Clark University*, 817 F.2d 931 (1st Cir. 1987)), the Supreme Court has made it quite clear that universities are not immune from Title VII. They acknowledge the respect that should be shown to faculty's professional opinions in promotion cases. The courts "should show great respect for the faculty's professional judgment." See *Univ. of Pa. v. EEOC*, 493 U.S. 182, 198-99 (1990).

"A decentralized decision-making structure founded largely on peer judgment is based on generations of almost universal tradition . . . It would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a court to review." See *Zahorik v. Cornell University*, 729 F.2d 85, 96 (2nd Cir. 1984).

Courts have been wary of intruding into the world of University tenure and promotion decisions because of the time-honored tradition of respecting the faculty's scholarly opinions. But, when the decision is made by one person at the top, who ignores the professional opinions of the faculty, then he does not have the right to be "unaccountable" for his decision, since it is an employee's right to be free from discriminatory actions.

His actions do not prevent or insulate his decision from any judicial review.

Other courts have also questioned the validity of University administrative decisions that ignore the professional opinions of scholars within the field. "We add that Brown's near unanimous endorsement by colleagues within and without her department suggest strongly that there are no issues of collegiality or the like which might make the granting of tenure inappropriate." See *Brown*, at 361. Courts must generally "defer to the expertise of academic peers in reaching subjective judgments" about a candidate's academic qualifications and potential. *Namenwirth v. Board of Regents of University of Wisconsin System*, 769 F.2d 1235, 1244 (7th Cir. 1985).

"In recent years, many courts have cited the *Faro* opinion for the broad proposition that courts should exercise minimal scrutiny of college and University employment practices. . . . This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common sense position we took in *Faro*, namely that courts must be ever mindful of relative institutional competencies, has been pressed beyond all reasonable limits, and may be employed to undercut the Civil Rights Act of 1964." *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1153 (2nd Cir. 1978).

Plaintiff showed that the President and Provost "manifestly applied unequal standards" to her promotion applications. The trial court and jury were satisifed that the evidence was so compelling as to permit a reasonable

finding of one-sidedness going beyond mere difference in judgment, when comparing the qualifications of plaintiff to males promoted.

In *Namenwirth v. Board of Regents of University of Wisconsin System*, " . . . [T]o prove the proffered motive is not worthy of belief, a comparative evidence is appropriate if others were hired or promoted though by the same reasoning they ought to have been excluded, then the motive is a 'pretext.' " *Namenwirth*, at 1240, *citing Mozee v. Jeffboat*, 746 F.2d 365, 369 (7th Cir. 1984).

With respect to Defendant's claim of "lack of scholarship," Plaintiff presented evidence of consistently outstanding annual performance reviews, including research and other scholarly activities. Moreover, the jury considered evidence that male employees with poorer performance records were promoted. In addition to evidence that males were treated more favorably than Plaintiff, the jury considered statistical data which reflected a pattern of discrimination. Yet, the Fifth Circuit discounted the statistical evidence.

In addition, the University did not adhere to the written guidelines given to faculty. The Provost's standards for promotion were based on "publications," yet written guidelines state that promotions are based on 40% teaching, 40% research and 20% service. Research is defined in the guidelines for promotion within Travis' college as "scholarly publications, extramural funding and presentations at professional conferences." Travis was never given a written explanation for the reasons for her denial or how she failed to meet the standards.

A deviation from written guidelines can create an inference of discrimination. See *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988). See also *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1422-23 (3rd Cir. 1991) (en banc), *cert. denied*, 502 U.S. 911 (1991). "The Agency's failure to adhere to its own rules is evidence of discriminatory intent."

Since the Provost followed procedures not outlined in the promotion process described in the faculty handbook (R.O.A. Vol. 3, p. 490) and had numerous inconsistencies in his testimony, the jury could doubt the credibility of the Provost along with the reasons proffered by the University and could infer discriminatory intent.

IV. The decision of the Fifth Circuit violates the Supreme Court's ruling in *Price Waterhouse* when it based its decision on the defendants' proffered reason that was not known at the time of the decision and also was shown to contain substantial and numerous errors.

The Fifth Circuit panel determined that there was no evidence of discrimination since the "four males had stronger records than Travis," using Provost Garza's "detailed analysis" of scholarly accomplishments. Travis challenged Garza's testimony on the basis of its post-hoc nature and its numerous errors. Garza made his analysis in 1996, AFTER the promotion decisions in '94 and '95. R.O.A. Vol. 10, pp. 747-749; Vol. 9, p. 641. Plaintiff objected to the admission of the charts since they had not been presented before trial, but was overruled, with the statement that they could be admitted (without names and

gender) for the purpose of showing categories for evaluating academic scholarship. Yet, the panel's decision accords a great deal of weight and implicit credibility to Garza's "detailed analysis" of journals and other publications. The jury, as finder of fact, could reasonably conclude that this after-the-fact analysis containing unreliable information was merely an attempt to cover-up for the University's discrimination.

The Supreme Court in *Price Waterhouse* held that in a mixed-motive case, the employer could rely only on a legitimate motive it held at the time of the adverse employment action. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989). "An employer ***may not prevail*** in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." *Id.* at 250 (emphasis added).

Post-hoc evidence, or evidence the University developed after the decisions were made, should not be considered since the sole question to be answered is whether the employer discriminated against the employee on the basis of an impermissible factor *at the instant of the adverse action*. The decision requires the employer's legitimate, sufficient reason to have motivated the employer "at the moment of the decision." See *Mardell v. Harleysville Life Insurance Co.*, 31 F.3d 1221 (3rd Cir. 1994).

In *Eastland v. Tennessee Valley Auth.*, 704 F.2d 613, 626 (11th Cir. 1983), *cert. denied*, 465 U.S. 1066, 104 S.Ct. (1984), the court held that the employer's proffered nondiscriminatory reason was pretextual because the employer was unaware of the proffered reason at the time it made its decision.

Yet, not only was the proffered reason in Travis' case developed post-hoc, it also contained numerous and substantial errors in fact. The Fifth Circuit adopted the University's contention that Travis' book chapters, articles in regional journals, her many conference presentations and invited talks "were of marginal scholarly significance." (Decision, p. 3). Yet testimony by faculty and expert witnesses confirmed the scholarly significance of Travis' work. (R.O.A. Vol. 8, pp. 536-50), thereby creating a conflict in the evidence requiring credibility determinations.

The Fifth Circuit asserts that Provost Garza's denial the second year was based "on the fact that Travis' recently accepted article was to appear in a journal based in India with a circulation of only about 300." (Decision, p. 5). Garza testified that "he could not find it" and concluded that it was "not a very good journal." R.O.A. Vol. 9, p. 687. Both statements are contrary to the evidence. Several witnesses testified to the international prestige of the journal, which is located in the libraries of 300 major research centers worldwide, including the University of Texas at Austin and Southwest Research Institute in San Antonio. R.O.A. Vol. 11, p. 996; Vol. 6, p. 101; Vol. 8, p. 451.

Compared with Swanson, one of the males promoted in 1994-95, Travis proved that she had superior teaching, service, and research credentials and was ranked higher by the College Promotion Committee. Garza based his recommendation for Swanson's promotion on the basis of the assertion that Swanson had a "theoretical" book. However, the evidence showed conclusively that Swanson's book was not theoretical and did not contribute original research. Even Swanson concedes such in the preface to

the book. Swanson's former Division Director testified that Swanson's publications did not contribute original research and had not been published in journals recognized nationally or regionally. R.O.A. Vol. 8, pp. 520-22.

Defendants' post-hoc determination of journal credibility, inaccurate and gross misrepresentations of Travis' credentials, and willful disregard for her peers' evaluation of her work all factored into the jury's and lower court's decision to discredit defendants' explanation that she was "lacking in scholarship."

Allowing post-hoc justifications, whereby written standards are ignored and new standards can be fabricated, will lead to the "likely consequence of the widespread use of post-hoc justifications and the underenforcement of Title VII, and consequently the underdeterrance of discriminatory employment practices." *Mardell*, at 1236.

The conflicts discussed above are clear and irreconcilable. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Betty TRAVIS, Plaintiff-Appellee,

v.

The BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM; University of Texas, at San Antonio, Defendants-Appellants.

No. 96-50764.

United States Court of Appeals,
Fifth Circuit.

Sept. 8, 1997.

Associate professor whose application for full professorship was denied brought action against university, provost, and president, alleging sex discrimination and retaliation for bringing administrative complaint and lawsuit. The United States District Court for the Western District of Texas, Alan D. Albright, United States Magistrate Judge, entered judgment upon jury verdict for professor, and defendants appealed denial of their motion for judgment as matter of law. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) university's failure to promote professor did not amount to sex discrimination, and (2) university did not improperly retaliate against professor.

Reversed and judgment rendered.

Appeal from the United States District Court for the Western District of Texas.

Before POLITZ, Chief Judge, and HIGGINBOTHAM and SMITH, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Betty Travis prevailed in a jury trial against her employer, the University of Texas at San Antonio and the Board of Regents of the University of Texas System. After reviewing the record, we conclude that as a matter of law Travis did not prove a violation of Title VII by a preponderance of the evidence. Thus, we agree with the university and the regents that the lower court should have entered judgment against Travis.

I.

The University of Texas at San Antonio hired Betty Travis on a tenure track as an assistant professor of mathematics in 1980. The university awarded her tenure and promoted her to associate professor in 1985. Her specialty is mathematics education.

During the 1993-1994 academic year, she applied for promotion to full professor. The university puts promotion applications through several tiers of reviews and recommendations. An applicant's file, which includes teaching evaluations, publications, letters of recommendation, evidence of service to the university, and so forth, moves from the applicant's division to the applicant's college to the provost to the president and ultimately to the board of regents. Each stage involves an independent review. The president's decision to promote or not to promote – a decision that the board of regents virtually always adopts – comes in light of the recommendations from the lower levels, but is not dictated by them.

Travis received favorable recommendations from a committee of the Division of Mathematics and Statistics, from the division's director, from a committee of the College of Sciences and Engineering, and from the dean of the college. But the provost, Raymond T. Garza, recommended against promotion. At trial, Garza explained that although Travis's record in teaching and service was excellent, her research was meager and was not published in the better academic journals. He noticed that reviewers on the division and college levels had failed to make detailed comments on her publications and concluded that they had not scrutinized them carefully. Although the dean of the college praised Travis for her teaching skills and her success in landing grants for the university, his report indicated that Travis's research was only "marginally adequate." After investigating Travis's publications, Garza concluded that only one co-authored article had appeared in a "premier" journal and that she had placed only three articles in what he called "category 2" journals. She had also published two chapters in books and three pieces in "regional journals," but in Garza's view those, along with her many conference presentations and invited talks, were of marginal scholarly significance. Garza decided that, compared to other faculty members applying for status as full professor, Travis had not yet made a sufficient contribution to scholarship in her field. The university's president, Samuel Kirkpatrick, concurred in Garza's analysis. Travis received notification in March of 1994 that her application for promotion had been denied.

Travis immediately scheduled a meeting with Provost Garza in early April to discuss the reasons for the

denial. Garza explained that in order to earn a promotion, her research would need to be more substantial. He indicated that, in combination with her outstanding teaching and service, she was very close to meeting the university's expectations for a full professor. Several weeks later, Travis told Garza that a journal had expressed interest in one of her papers, and Garza promised to bring that fact to the attention of the president, although he did not know whether it was too late to reverse the denial. The president informed Travis by letter that if she had additional material to include in her file she would have to submit another promotion application in the 1994-1995 academic year.

On May 11, 1994, Travis filed a charge of discrimination with the Equal Employment Opportunity Commission. She amended her charge on August 5 to add an allegation of unequal pay after learning that Jerry Keating, a male colleague hired in 1981, had been appointed Acting Division Director and earned $12,000 more than she did. On September 24, she filed this lawsuit, which was removed to federal court. The petition alleged causes of action against the university and the board of regents and also against Garza and Kirkpatrick in their individual capacities. Travis alleged that the university had breached a contract and violated the Fair Labor Standards Act and the Texas Equal Rights Amendment by failing to honor a memorandum in which it notified Travis of her salary as Interim Associate Dean. According to the university, a clerical error caused the memorandum to include the salary of Keating, who preceded Travis in the associate deanship, rather than Travis's salary, which was nearly $12,000 less. Travis also alleged that Garza and

Kirkpatrick violated the First Amendment by retaliating against her for positions she took in the faculty senate.

As a result of this suit, the university investigated Travis's salary and discovered that a grant from the Office of Naval Research included a salary supplement that seemed to violate OMB guidelines. Richard Dawson, the university's director of internal audit, concluded that OMB Circular A-21 prohibited government grant money from going toward salary supplements above a faculty member's base salary. Although the university had approved the grant that included Travis's supplement, there was no evidence that university officials were aware of any potential violation prior to the audit. Once he learned about the violation, Kirkpatrick was concerned enough to order an audit of all salary supplements at the university. This audit revealed that an untenured faculty member was also receiving a salary supplement that exceeded her base salary. The university terminated both supplements in an effort to comply with federal regulations.

Travis applied again for full-professor status during the 1994-1995 academic year. The only significant change was the acceptance of the article she had mentioned to Provost Garza after the first denial. She also had a new article under submission, three new grants, and talks at two national conferences. She got the same result: the lower levels recommended promotion, but Garza recommended denying the application, and, in spite of Travis's lawsuit, Kirkpatrick followed that recommendation. Garza based his recommendation on the fact that Travis's recently accepted article was to appear in a journal based in India with a circulation of only about 300. Without any

significant new research, he was unwilling to reach a different result in 1994-1995 than he had in 1993-1994.

Travis had served as assistant director of her division since 1989. But a few weeks after accepting the post of division director in January of 1995, Don Allen decided that the position of assistant division director was no longer necessary. The university eliminated the position of assistant division director in February of 1995, although it paid Travis her administrative supplement through the end of the academic year.

In an April 10, 1995, amended complaint, Travis sought damages for the removal of her salary supplement and her termination as assistant division director. These actions, Travis alleged, along with the denial of her 1994-1995 application for a promotion, were retaliation for her 1994 EEOC complaint and lawsuit.

The parties agreed to trial before a magistrate judge. After five days of trial, the jury found that the university's denial of Travis's promotion was sexually discriminatory and that the university had retaliated against her for filing a discrimination suit. It also found by special interrogatory that Garza and Kirkpatrick did not violate her First Amendment rights. No other theories of recovery went before the jury. The court ordered the regents to promote Travis as of September 1, 1994, and to pay back- and front-pay for the failure to promote, for the termination as assistant division director, and for the failure to pay supplemental grant salary. It also granted Travis's request in full for $91,088.75 in attorneys' fees. The university and the regents appeal the court's denial of their

motion for judgment as a matter of law on both the sex-discrimination claim and the retaliation claims.[1]

II.

We review *de novo* the lower court's ruling on a motion for judgment as a matter of law under Fed.R.Civ.P. 50(a). *Omnitech Int'l, Inc. v. Clorox Co.*, 11 F.3d 1316, 1322-23 (5th Cir.), *cert. denied*, 513 U.S. 815, 115 S.Ct. 71, 130 L.Ed.2d 26 (1994). A court should grant a Rule 50(a) motion not only when the non-movant presents no evidence, but also when there is not a sufficient "conflict in substantial evidence to create a jury question." *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 804 (5th Cir.1997) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir.1969) (en banc)).

Travis's sex-discrimination and retaliation theories are subject to the burden-shifting analysis expounded in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). But we need not parse the evidence into discrete segments corresponding to a prima facie case, an articulation of a legitimate, nondiscriminatory reason for the employer's decision, and a showing of pretext. "When a case has been fully tried on the merits, the adequacy of a party's

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[1] The defendants have also appealed evidentiary rulings and the imposition of attorneys' fees. We have no occasion to consider those matters.

showing at any particular stage of the *McDonnell Douglas* ritual is unimportant." *Molnar v. Ebasco Constructors, Inc.*, 986 F.2d 115, 118 (5th Cir.1993) (citation omitted).

A Title VII plaintiff bears the burden of proving not only that the employer's purported reasons for taking an adverse employment action are pretextual, but also that the employer engaged in illegal discrimination. *Hicks*, 509 U.S. at 511, 113 S.Ct. at 2749. In this case, Travis's burden is crucial for two reasons. First, it means that "[to] satisfy the statutory burden, the plaintiff must offer some evidence, whether direct or circumstantial, that permits the jury to infer that the proffered explanation was a pretext for illegal discrimination." *Swanson v. General Services Admin.*, 110 F.3d 1180, 1185 (5th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3129 (U.S. July 23, 1997) (No. 97-163). Second, although evidence of pretext, in conjunction with a prima facie case, usually creates a jury question on the ultimate issue of discrimination, it does not always do so. We engage in "traditional sufficiency-of-the-evidence analysis" to determine whether reasonable jurors could find discriminatory treatment. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir.1996) (en banc). In other words, it is possible for a plaintiff's evidence to permit a tenuous inference of pretext and, by extension, discrimination, and yet for the evidence to be insufficient as a matter of law to support a finding of discrimination. *See Walton v. Bisco Industries*, 119 F.3d 368, 372 (5th Cir. 1997) ("Separate from her pretext evidence, Walton has offered nothing to suggest that impermissible discrimination underlies her termination."); *Ontiveros v. Asarco, Inc.*, 83 F.3d 732, 734 (5th Cir.1996) ("There may barely be enough evidence to sustain a finding of pretext. However, there is

insufficient evidence to support a reasonable inference of discrimination.").

III.

We turn first to Travis's claim that the denial of her promotion was caused by sex discrimination. Surprisingly little of the trial involved any reference to Travis's sex. A casual observer would have thought the jury had been asked to decide simply whether the university should have promoted Travis. During their extensive testimony, Travis, Garza, and Kirkpatrick discussed primarily topics such as the prestige of various academic journals, the legitimacy of publications based on a doctoral dissertation, the scholarly value of oral presentations to gatherings of academics or groups of local educators, the place of education specialists within a division of mathematics and statistics, and so forth. If nothing else, the trial made it clear that measuring the value of academic work is sticky business.

Given the legitimate controversy over the quality and importance of Travis's research, the jury could reasonably have concluded that U.T.–San Antonio should have promoted her to full professor. Indeed, we assume for the purposes of this analysis that a reasonable jury could even have concluded that the adequacy of Travis's research was not the real reason that the university twice denied her promotion. The jury could have drawn the conclusion that the administration disagrees with Travis's vision of the university. Trial testimony suggested that she might oppose the university's efforts to emulate major research institutions by focusing on developing

doctoral programs. The administration might have thought that her energetic pursuit of improvements in education are incompatible with the division's mission of conducting pure research. Or perhaps Garza and Kirkpatrick were simply jealous of her popularity among students.

The dispositive question, however, is not whether the university made a mistake or whether it gave forthright explanations for its failure to promote. Instead, we must determine whether Travis has presented sufficient evidence that her sex was the reason for the failure to promote. We can find no more than a sliver of a suggestion that sex had anything to do with this employment dispute. We conclude that this sliver, viewed against the background of the university's evidence, is inadequate to produce an evidentiary conflict strong enough to survive a Rule 50(a) attack.

First, Travis claimed that the university treated several male professors more favorably. Lawrence Williams was the only other candidate from the College of Sciences and Engineering who applied for promotion from associate to full professor in the 1993-1994 cycle. In 1994-1995, three other males applied for and received promotions to full professor. Their success, according to Travis, indicates gender bias. Provost Garza, however, explained to the jury in detail his system for evaluating scholarly accomplishments and why these four males had stronger records than Travis's. His calculations indicated that one of the males had 47 articles in "premier" journals, one had 15 such articles, one had six, and one had three. According to Garza, Travis had published only one article in a top-tier journal. The male with only three articles in a

premier journal had also published a book with a university press, an accomplishment on which Garza placed significant weight.

The university could have promoted Travis along with these males; unlike many positions, there is no artificial limit on the number of full professors the university can sustain. Thus, even if the four males were indeed better candidates than Travis, the denial of promotion could still conceivably have been caused by her sex. But Travis did not give the jury any basis for concluding that sex played a role in these five promotion decisions. For the most part, the four males had stronger records, measured by the standard academic criteria outlined by Garza. We cannot turn an attack on those standards, however outmoded they might be, into a Title VII case. By themselves, minor, reasonable disagreements about scholarly qualifications do not raise an inference that the disagreements have their roots in sex discrimination.

Second, Travis urges that the jury could find disparate treatment based on a comment her dean made in 1986 that she was not "tough enough" to serve as acting director of her division. That dean, however, is no longer employed by the university. Kirkpatrick and Garza did not come to university until 1990 and 1991 respectively. This isolated comment, made more than seven years before the disputed employment decisions by a person with no connection to Travis's promotion applications, has no evidentiary force. *See Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 434 (5th Cir.1995) ("[A] single comment, made several years prior to the challenged conduct, is a stray remark too remote in time to support an inference

of sex discrimination in later employment actions."); *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1221 (5th Cir.1995) (finding irrelevant testimony of "sporadic and isolated" anecdotes of discrimination committed by supervisors not involved in the employment decisions at issue in the plaintiffs' suit).

Third, Travis indicated to the jury that females seeking promotion have faced discriminatory delays. Since 1990, the university has denied promotions to two female associate professors and to one male associate professor within Travis's college. During that time, six applicants have received promotions to full professor on their first application, and all of them have been male. This extremely small sample hardly establishes discrimination. Moreover, the two women denied promotions were granted promotions when they applied the following year. Travis's evidence is weak on this score because it is geared to her division, which recommended Travis for promotion at each stage on both of her applications. The more relevant statistic is university-wide, and there the university seems to be on solid ground. Since 1990, 12 of 25 male applicants have received promotions from associate to full professor, while 7 of 13 female applicants received the same promotions. Because Garza and Kirkpatrick must approve all of these promotions, these numbers suggest that they have not been inclined to turn women down based on their sex.

Fourth, Travis attempted to draw the jury's attention to pay disparities between her salary and Keating's salary. The university, however, accounted for these disparities by explaining that other universities had expressed interest in hiring Keating at higher salaries. To

stay competitive, the university had to make it worth Keating's while to remain in San Antonio. Travis did not effectively rebut this explanation.

Travis's other references to sex discrimination during the trial were of no significance. In sum, the relative absence of evidence of sex discrimination could not have given the jury insight into whether the university allowed Travis's sex to play a role in the decision not to promote her. The jury may not have liked the academic criteria in use at the University of Texas at San Antonio, but that was not a legitimate ground for finding the university liable for a Title VII violation. When we view all of the evidence and resolve any doubts in favor of Travis, we cannot find sufficient evidence to support the jury's finding that Travis's being female caused the university to deny her a promotion.

IV.

The jury found that the university retaliated against Travis for filing her discrimination claim in three ways: (1) by denying her a promotion in the 1994-1995 cycle, (2) by removing her as assistant division director, and (3) by terminating her salary supplement from the Office of Naval Research grant.

A.

As we have explained, the university satisfied its burden of producing evidence of a nondiscriminatory reason for denying Travis's second application for a promotion. Outside of disputing the merits of the promotion

decision, Travis did not present evidence of retaliation. Garcia explained that, because of the pending lawsuit, he made a special effort to confirm his conclusion that Travis's file was not significantly different from the application she filed in 1993-1994. Contrary to Travis's suggestion, Garza did not testify that her suit caused him to try to find weaknesses in the 1994-1995 application. A few days after the university denied Travis's 1994-1995 promotion, the dean of the college remarked that it was because Travis "hit them with a lawsuit." But there was no evidence that the dean, who supported Travis's promotion, had any special knowledge of retaliation. In context, the remark was mere speculation.

Because of the marginal change in Travis's credentials between the unsuccessful 1993-1994 application and the 1994-1995 application, a different decision on the merits of her promotion would have been unusual. Under these circumstances, the mere fact that Travis filed an EEOC charge cannot support the jury's conclusion that the denial was retaliatory.

B.

The university explained the termination of Travis's position as assistant division director by offering the testimony of Linda Whitson, vice president of administration and planning. Whitson stated that Don Allen became division director in January of 1995 and that he quickly decided that he did not need an assistant. Travis did not contradict Whitson's claim that there were no difficulties in the relationship between Allen and Travis. More

importantly, Travis did not attempt to refute the university's evidence that Allen made his decision for legitimate administrative reasons. There was no testimony that Allen even knew about Travis's EEOC charge. In other words, Travis did not carry her burden of producing evidence of retaliatory intent. The jury might speculate that Allen was cooperating with Garza and Kirkpatrick to punish Travis, but without any evidence to that effect, we cannot uphold the jury's findings.

C.

Finally, the jury found that the university retaliated against Travis when it cut off her salary supplement. According to the university, it did not discover that the supplement was in excess of Travis's base salary until it investigated her allegation of unequal pay. When the problem came to light, President Kirkpatrick took swift action: he notified the director of internal audit and asked him to make the matter top priority. Kirkpatrick's memo mentioned Travis by name so that the auditor would at least have a place to begin his investigation. Kirkpatrick also testified that he contacted the general counsel of the U.T. system, the executive vice chancellor of the system, and presidents of other Texas universities to determine whether his understanding of the OMB regulation was accurate. After concluding that Travis's supplement was a violation of federal law, he decided to end it prospectively only, assuming that the federal government would not be concerned about payments Travis had already received. One other faculty member was receiving a similar grant, and the university ended it, as well.

Again, aside from the fact that the university cut off the salary supplement after it knew of Travis's suit, Travis did little to rebut the university's account of its reasons for acting. On cross-examination, defense witnesses admitted that the OMB regulation is difficult to interpret and that one might be able to make a colorable argument that Travis's grant satisfied the regulation. But Travis did not present testimony that Kirkpatrick or the university misunderstood the regulation, much less that their effort to adhere to their understanding of the regulation was pretextual. Notwithstanding Travis's accusations to the contrary, Kirkpatrick's procedures were consistent with his stated concerns. Without evidence, Travis's assertion that retaliation caused the termination of her salary supplement is merely her own subjective belief, which is insufficient to create a jury question. *See Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 153 (5th Cir.1995) (reversing a jury verdict of discrimination and collecting cases), *cert. denied*, ___ U.S. ___, 116 S.Ct. 709, 133 L.Ed.2d 664 (1996).

V.

The judgment based on the jury verdict below is REVERSED, and a take-nothing judgment is RENDERED in favor of the university and the board of regents.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50764

BETTY TRAVIS

Plaintiff-Appellee

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM; UNIVERSITY OF TEXAS, at San Antonio

Defendants-Appellants

Appeal from the United States District Court
for the Western District of Texas, Austin

(Filed Oct. 7, 1997)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 9/8/97, 5 Cir., ___, ___ F.3d ___)

Before POLITZ, Chief Judge, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible E. Higginbotham
United States Circuit Judge